



LCCSA response to
Criminal Legal Aid Review Remuneration
for pre-charge engagement
consultation 14/12/2020

Consultation Questions

Question One: Do you agree with our proposed approach to paying for work associated with pre-charge engagement? Please state yes/no and give reasons.

A written agreement

1. We do not agree with the requirement for a written agreement between the prosecutor and/or investigator and the suspect and/or their representative. The concept of pre-charge engagement ('PCE') is not new to our members, but it is currently conducted on behalf of those willing and able to pay privately. From that experience suspects who wish to discuss additional evidence or lines of enquiry after an interview has concluded do so under strict confidence. The legal adviser's role is to assess the evidence, its relevance, weight, and any potential adverse consequences before advising on whether to provide it to an investigator. To approach an investigator for a written agreement before doing so would be to breach that confidence. The lay client would not be reassured to be told the need to raise these issues (even if only in outline) was so their adviser could secure a new funding stream.
2. Investigators for their part, are trained to be inquisitive. They are unlikely to agree to PCE without sufficient details. It is therefore not difficult to foresee how this would create an insurmountable obstacle. If, however they were instructed to agree to PCE in certain categories of case without specific details being supplied then a written agreement would be rendered obsolete.
3. It is not our experience to have any contact with a prosecutor pre-charge. They are not a practical route by which a written agreement could be achieved. Even if this situation were to change the same objections raised in para 1 & 2 would still apply regarding confidentiality.
4. To limit the scope of this work to a written agreement would be to waste an opportunity to secure the benefits envisaged in the Attorney General's Review.

Process for claiming

5. We agree the fee should not be means tested to ensure work begins promptly so it can be delivered in good time for a charging decision.
6. We do not agree with the way the sufficient benefit test is currently drafted for the reasons described above. There is a way to require providers to evidence

sufficient benefit which would protect the fund while also allowing the benefits of PCE to be realised. The mechanism for self-granted funding for the Advice and Appeal class of work under CRM 1 & 2 shows this can be achieved.

Rates

7. While the consultation acknowledges practitioners' concerns about being offered 1990s levels of pay for this work it does not have sufficient regard to how this will frustrate the aims of this project. Experienced defence practitioners are not viable if their practice rests primarily on the rates of pay from legal aid, particularly for lower crime work. Many view lower crime as a loss leader, a necessary service that enables them to secure more lucrative work. This proposal requires them to take on yet more loss-making work at the expense of that more lucrative work. We predict the current requirement to have a written agreement will narrow the scope of this work to such a small number that, when combined to the dire rates of remuneration on offer, may lead to the scheme being overlooked or forgotten as time passes.
8. For those solicitors currently conducting PCE on private terms this scheme may adversely affect the financial position, they being obliged to offer this work on far worse terms or to lose the client to another provider.

Question Two: If you do not agree with our proposed approach to paying for work associated with pre-charge engagement, please suggest an alternative and provide a supporting explanation.

Written agreement vs sufficient benefit test

9. The written agreement should be dispensed with as a pre-requisite. The provider should ensure a file note is created to detail which of the criteria in para 15 of the consultation has been engaged during the disclosure and interview process for this investigation. It should detail how the issue was raised on the facts of the case; an invitation to engage in PCE by the investigator will be one such method but should not be the only one. It may arise out of the line of questioning or from contact from the suspect at a time subsequent to the initial interview.

Disbursements

10. Though not mentioned in the consultation we would expect necessary disbursements to be recoverable. Interpreters may be required, some evidence may require the involvement of an expert such as to assist in recovering digital artifacts, conducting a second post-mortem or obtaining the opinion of a psychiatrist.

Question Three: Do you agree with the assumptions and conclusions outlined in the Impact Assessment? Please state yes/no and give reasons. Please provide any empirical evidence relating to the proposals in this document.

11. Solicitors will not be fairly remunerated if, as a consequence of the need to have a written agreement, they conduct extensive work advising suspects in confidence prior to requesting it. That necessary work would go unfunded and further reduce the overall rate of pay.

Question Four: From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? We would welcome examples, case studies, research or other types of evidence that support your views

12. We are not aware of any.

Question Five: What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the government should consider? Please provide evidence and reasons.

13. We are not aware of any.

London Criminal Courts Solicitors' Association 24th January 2021

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